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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE COLLEGE ATHLETE NIL
LITIGATION

Case No. 4:20-cv-03919-CW

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' ADMINISTRATIVE
MOTION TO CLARIFY ORDER
RESOLVING DISCOVERY DISPUTE
ABOUT DEFENDANTS'
SUPPLEMENTAL INITIAL
DISCLOSURE (CIV. L.R. 7-11)**

Trial Date: 2025-01-27
Judge: Hon. Claudia Wilken

1 Plaintiffs' Administrative Motion, ECF No. 380 ("Motion") makes an extraordinary request to
 2 preclude Defendants from receiving documents in response to subpoenas to third parties *served within*
 3 *the discovery period*. Plaintiffs could have raised this issue in their original motion regarding
 4 depositions, but did not, and they offer no justification for raising this new issue in the guise of a
 5 clarification. Plaintiffs' arguments are in any event meritless and unfounded. So is their proposed one-
 6 sided and patently unfair solution of allowing only them to take depositions and seek additional
 7 documents that could then be included in their *rebuttal* expert reports, which would limit Defendants'
 8 efforts to respond and surely prompt further motion practice about new and undisclosed opinions.

9 First, Plaintiffs omit key facts about the discovery at issue. Defendants issued the document
 10 subpoenas in question to Deloitte Consulting LLP ("Deloitte") and Huron Consulting Group Inc.
 11 ("Huron") on October 3, 2023, almost a full *month before* the close of fact discovery and *before*
 12 Plaintiffs filed their Notice of Dispute Re Defendants' Supplemental Initial Disclosures, ECF No. 372
 13 (the "Dispute"). Both Plaintiffs and Defendants have subpoenaed third parties seeking documents
 14 within the discovery period—and are continuing to receive documents from third parties. In fact,
 15 Plaintiffs produced documents received from third parties pursuant to subpoena just days ago. *See*
 16 ECF No. 380-1 at 1.

17 Second, Plaintiffs misrepresent the facts when they suggest this issue implicates this Court's
 18 Order, ECF No. 374 ("Order") regarding depositions. Prior to filing the present Motion, Plaintiffs
 19 never once argued to the Court that Defendants' document subpoenas to Deloitte or Huron should be
 20 excluded, even though the document subpoenas were served before the Dispute was briefed.
 21 Accordingly, the Court's Order ruled on witness disclosures, not document discovery. *See* Order at 2
 22 ("Plaintiffs challenge the Defendants' supplemental disclosure of 37 *witnesses*[.]") (emphasis added);
 23 *id.* at 3 ("I am permitting 21 and excluding 16 of the *newly disclosed witnesses*[.]") (emphasis added).
 24 And after this Court issued its order, Defendants withdrew their 30(b)(6) deposition subpoenas to
 25 Deloitte and Huron. *See* ECF No. 380-1 at 4. Plaintiffs' effort to read into the Order a ruling on an
 26 issue that was never briefed is unavailing.

27 Third, Plaintiffs' claims of prejudice ring hollow, given their continued pursuit of document
 28 discovery. Throughout the discovery period, Plaintiffs have continually sought productions of

1 documents from dozens of entities they never listed in their initial disclosures, and those parties have
2 produced—and continue to produce—documents in response to Plaintiffs’ subpoenas. Plaintiffs
3 produced documents received from non-parties to Defendants as recently as October 20, 2023, *see* ECF
4 No. 380-1 at 1, and document subpoenas remain outstanding. Defendants plainly will not have the
5 opportunity to depose witnesses about the contents of those documents or seek additional documents
6 or depositions based on the October 20 production or any other productions; there is no reason why
7 Plaintiffs should be treated any differently.

8 Moreover, despite their claims in this Motion that document production at this juncture would
9 cause prejudice, Plaintiffs continue to request supplemental productions from Defendants that they
10 could have requested months ago. For example, on October 20, 2023, Plaintiffs asked Defendants to
11 supplement their productions with “communications between Defendants and Congress related to
12 ‘Days on the Hill,’ new legislation, and documents specifically given to Congress by NCAA Staff and
13 President Charlie Baker from March 1, 2023 to the present.” *See* Exhibit A. Given the late timing of
14 Plaintiffs’ requests, any documents Defendants produce in response to Plaintiffs’ requests will
15 necessarily be served after the close of fact discovery. And while this present dispute concerns
16 documents, not depositions, it bears noting that despite their strenuous claims of prejudice from
17 Defendants’ disclosure of new witnesses during the discovery period, Plaintiffs themselves issued
18 another deposition subpoena to a third party witness who is not listed on their initial disclosures,
19 President John DeGioia of Georgetown, just last week. What’s permitted for Plaintiffs should be
20 permitted for Defendants as well.

21 Plaintiffs’ proposed remedy highlights what this Motion is really all about. Plaintiffs request
22 that the Court in essence allow a one-way modification of the Scheduling Order to allow Plaintiffs
23 additional discovery, including document requests and supplemental depositions of Defendants’
24 witnesses, until the deadline for Plaintiffs’ merits expert reply on February 23, 2024, with no reciprocal
25 benefit to Defendants. Nothing in the rules or sound discovery practice warrants creating a
26 fundamentally skewed playing field. Both sides will have sufficient time and opportunity to address
27 any documents produced by Deloitte or Huron (as well as additional documents produced by other
28 third parties and Defendants to subpoenas issued during the discovery period). That is all the rules

1 require. Moreover, allowing Plaintiffs to conduct additional discovery up to their rebuttal reports
2 would undermine the expert process by significantly raising the risk that Plaintiffs' experts attempt to
3 present new, undisclosed opinions in reply instead of merely responding to Defendants' expert reports,
4 in violation of Federal Rule 26(a)(2)(B)(i).

5 Defendants respectfully request that the Court deny Plaintiffs' Motion.
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Dated: October 27, 2023

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SIGNATURE ATTESTATION

I, Rakesh N. Kilaru, am the CM/ECF user whose ID and password are being used to file this Defendants' Response to Plaintiffs' Administrative Motion to Clarify Order Resolving Discovery Dispute About Defendants' Supplemental Initial Disclosure (Civ. L.R. 7-11). In compliance with Local Rule 5-1(i)(3), I hereby attest that concurrence in the filing of this document has been obtained from each of the other signatories.

Dated: October 27, 2023

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